

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
C. J. BUILDERS, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 87-40

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of a notice and order of civil penalty of \$500 for outdoor burning, allegedly in violation of Section 8.06(3) of respondent's Regulation I, came on for hearing before the Board; Lawrence J. Faulk, Presiding, Wick Dufford and Judith A. Bendor, at Lacey on September 28, 1987. Respondent agency elected a formal hearing in accordance with WAC 371-08-155. Gene Barker and Associates officially reported the proceedings.

Appellant C. J. Builders, Inc., appeared and was represented by its President, Clyde Downing. Respondent public agency Puget Sound Air Pollution Control Agency appeared and was represented by its attorney, Keith D. McGoffin.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Argument was heard.

3 From the testimony, evidence, and contentions of the parties the
4 Board makes these

5 FINDINGS OF FACT

6 I

7 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
8 activated air pollution control authority under terms of the state's
9 Clean Air Act, empowered to monitor and enforce outdoor open burning
10 codes in a five-county area of mid-Puget Sound.

11 The agency has filed with the Board a certified copy of its
12 Regulation I, and all amendments thereto, of which we take judicial
13 notice.

14 II

15 C. J. Builders, Inc., is a contractor specializing in home
16 construction. The business is located in Kent, Washington. Mr. Clyde
17 Downing is its president.

18 III

19 On June 27, 1986, personnel from King County Fire Protection
20 District #37 responded to a citizen complaint about open burning at or
21 near 11215 220th Place S.E., Kent, Washington. On the scene, the fire
22 department personnel contacted the property owner, Mr. Clyde Downing,
23 and asked him to extinguish the fire.

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25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
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1
2 IV

3 On the afternoon of June 28, 1986, Lt. Martin Woodin of the Fire
4 District visited the same site. At the scene he observed two fires
5 approximately 15 feet in diameter by 10 feet high, containing stumps.
6 The fires appeared to have been burning for some time.

7 Lt. Woodin contacted Clyde Downing on the property and told him he
8 would have to put the fire out. Mr. Downing refused. Lt. Woodin then
9 asked Mr. Downing to await the arrival of the police. Mr. Downing
10 responded by leaving the scene. The fire department then extinguished
11 the fires.

12 V

13 The fire department advised PSAPCA about the fires observed on
14 June 28, 1986. PSAPCA's inspector searched the agency's files and
15 determined that the site of the fires was within the urbanized area as
16 defined by the United States Bureau of the Census. He further
17 determined that no Population Density Verification had been issued in
18 relation to the burning in question.

19 VI

20 On July 7, 1986, notices of violation Nos. 021294 and 021295 were
21 mailed to the appellant. On January 30, 1987, notice and order of
22 civil penalty No. 6616 for \$500 was issued to appellant for allegedly
23 violating Section 8.06(3) of Regulation I. Feeling aggrieved by this
24 action, appellant appealed to this Board on February 26, 1987, and the
25 appeal became our number PCHB 87-40.

27 FINAL FINDINGS OF FACT,
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1 VII

2 Mr. Downing was aware of the existence of PSAPCA and of its
3 program of regulating open burning. On a prior occasion he had been
4 penalized by the agency for an open fire containing rubber tires,
5 scrap lumber and other treated materials (prohibited materials), which
6 penalty was ultimately paid in full by appellant. In the instant
7 case, no prior contact was made with PSAPCA and no authorization was
8 obtained to conduct said open fire.

9 VIII

10 Appellant argues that he is being discriminated against by PSAPCA,
11 and that other fires are allowed in areas that have a higher density
12 of population than his property. The record does not sustain these
13 assertions.

14 IX

15 Any Conclusion of Law which is deemed a Finding of Fact is hereby
16 adopted as such.

17 From these Findings, the Board comes to these

18 CONCLUSIONS OF LAW

19 I

20 The Board has jurisdiction over these persons and these matters.
21 Chapters 70.94 and 43.21B RCW.

22 II

23 The Legislature of the State of Washington has enacted the
24 following policy on outdoor fire:

25 FINAL FINDINGS OF FACT,
26 CONCLUSIONS OF LAW & ORDER
27 PCHB No. 87-40

1 It is the policy of the state to achieve and maintain high
2 levels of air quality and to this end to minimize to the
3 greatest extent reasonably possible the burning of outdoor
4 fires. Consistent with this policy, the legislature
5 declares that such fires should be allowed only a limited
6 basis under strict regulation and close control. RCW
7 70.94.740.

8 III

9 The means for implementing the policy of RCW 70.94.740 is outlined
10 in succeeding sections of the statute. RCW 70.94.755 calls for the
11 creation of a program to carry out the limited burning policy through
12 the adoption of regulations. Subject to the provisions of such a
13 program, RCW 70.94.750 allows restricted burning of natural residue
14 from land clearing projects.

15 IV

16 PSAPCA's Regulation I implements a program for land clearing
17 burning. Section 8.06(3) makes it unlawful for any person to cause or
18 allow land clearing burning within the urbanized area as defined by the
19 United States Bureau of Census unless PSAPCA has verified that the
20 average population density on the land within 0.6 miles of the proposed
21 burning site is 2,500 persons per square mile or less.

22 Section 8.06(3) was violated on June 28, 1986, when stumps were
23 burned on Mr. Downing's property without obtaining a Population Density
24 Verification from PSAPCA.

25 V

26 The purpose of the civil penalty is not retribution, but rather to

1 influence the behavior of the perpetrator and to deter violations
2 generally.

3 Considering all the facts and circumstances, we readily regard \$500
4 as an appropriate penalty in this instance.

5 Mr. Downing is in a business which involves land clearing and has
6 been so employed for some time. He should have an awareness of the
7 laws governing outdoor fires. His prior violation further underscores
8 this point. We believe the penalty imposed must be upheld in the
9 interests of the deterrence purposes of the law.

10 VI

11 Any Finding of Fact hereinafter determined to be a Conclusion of
12 Law is hereby adopted as such.

13 From these Conclusions, the Board enters this
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ORDER

Notice and Order of Civil Penalty No. 6616 is AFFIRMED.

DONE this 6th day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

 11/6/87
LAWRENCE J. FAULK, Presiding


WICK DUFFORD, Chairman


JUDITH A. BENDOR, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 87-40

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IRWIN RESEARCH & DEVELOPMENT,)	
)	
Appellant,	)	PCHB No. 87-42
)	
v.)	
)	
STATE OF WASHINGTON, DEPARTMENT	)	ORDER GRANTING
OF ECOLOGY,	)	JUDGMENT TO RESPONDENT
)	
Respondent.)	
)	

THIS MATTER arose on appellant's appeal, filed March 3, 1987, of a January 30, 1987, decision imposing a \$7,500 hazardous waste generation fee on appellant company for calendar year 1985.

On April 20, 1987, respondent Department of Ecology filed its Motion for Summary Judgment. Appellant Irwin Research and Development was afforded the period of ten days thereafter to reply in writing but did not do so.

FACTS

The following facts are found to be undisputed:

1. On February 27, 1986, Irwin Research & Development of Yakima,

1 Washington, submitted Generator Annual Dangerous Waste Report, Form
2 4. (See Exhibit A, Affidavit, Attachment 1.) Form 4, with
3 accompanying instructions, was provided by the Department of Ecology.

4 2. The report listed one manifest document which indicated
5 shipment of dangerous waste from the Irwin facility. The report
6 indicated that the manifest listed wastes which were generated in
7 1985. (See Form 4, 16. C.; the blank space indicates generated in
8 1985).

9 3. On the report Irwin described its wastes as a "Waste Metal
10 Cutting Fluid - Trim - Sol Brand." This waste is designated an
11 extremely hazardous waste because it is a persistent halogenated
12 hydrocarbon. See WAC 173-303-104 and WAC 173-303-084. The report
13 indicated that the manifest documented generation and disposal of over
14 4,980 pounds per month or per batch with a total of 4,980 pounds in
15 1985.

16 4. Based on the report, Ecology assessed a \$7,500 Hazardous Waste
17 Generator Assessment against Irwin, pursuant to chapter 70.105A RCW.
18 (See Exhibit A, Affidavit, Attachment 2.) This assessment was based
19 on the placement of Irwin's waste in Risk Class G7, pursuant to WAC
20 173-305-030(3)(b)(vii) and on the annual gross income (AGI) of Irwin
21 as reported by the State Department of Revenue as over \$10 million in
22 1985, placing Irwin in AGI Class 3 under WAC 173-305-030(3)(a). See
23 WAC 173-305-040(1)(a) for fee matrix. The 1985 AGI of Irwin is
24 reported to the Department of Revenue under one revenue number.

25 ORDER GRANTING
26 JUDGMENT TO RESPONDENT
27 PCHB No. 87-42

5. On August 29, 1986, Irwin requested review by Department of Ecology of the 1985 assessment. (See Exhibit A, Affidavit, Attachment 3.) It argued that the \$7,500 fee was unfair because the fee was assessed in addition to the time and money it had already spent complying with the Dangerous Waste Regulations, and that it had properly disposed of the waste which was at the low end of the halogenated hydrocarbon scale.

On January 30, 1986, Ecology determined that the \$7,500 fee was assessed correctly under chapter 70.105A RCW and chapter 173-305 WAC and reaffirmed the earlier assessment. (See Exhibit A, Affidavit, Attachment 4.)

On March 3, 1987, Irwin filed its appeal of the decision to the Pollution Control Hearings Board.

DECISION

1. There is no genuine issue of material fact.

2. The computation of the hazardous waste fee is correct, and reflects proper consideration of the statutory standards of 1) annual gross income and 2) the risk posed by the type of waste concerned.

RCW 70.105A.030(2)(3).

3. The Hazardous Waste Fee statute, RCW 70.105A.030 operates independently of the time or money spent to manage hazardous wastes under the Hazardous Waste Management statute, chapter 70.105 RCW. Neither is it relevant that generation of the waste in question was discontinued in subsequent years.

ORDER GRANTING
JUDGMENT TO RESPONDENT
PCHB No. 87-42

(3)

1 4. The statutory fee scheme adopted above is designed to help
2 defray the costs of conducting a state-wide hazardous waste program.
3 It is the enactment of the legislature and arguments concerning its
4 fairness are better addressed in that forum.


5 ORDER

6 The \$7,500 hazardous waste fee assessed by Department of Ecology
7 against Irwin Research & Development, Inc., is hereby affirmed.

8 DONE at Lacey, Washington, this 16 day of Sept,
9 1987.

10 POLLUTION CONTROL HEARINGS BOARD

11 
12 WICK DUFFORD, Chairman

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14 JUDITH A. BENDOR, Member
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25 ORDER GRANTING
26 JUDGMENT TO RESPONDENT
27 PCHB No. 87-42

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

GEORGIA PACIFIC CORPORATION,)	
)	
Appellant,	)	PCHB No. 87-45
)	
v.	)	FINAL FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND ORDER
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

This matter, the appeal of a civil penalty of \$5,000 for violation of the standard for average hourly ambient sulfur dioxide, came on for hearing before the Pollution Control Hearings Board on October 15, 1987, in Seattle, Washington. Respondent Department of Ecology elected a formal hearing pursuant to RCW 43.21B.230.

Appellant Georgia Pacific Corporation was represented by its attorney, Robert R. Davis, Jr. Respondent Department of Ecology was

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2 represented by Terese Neu Richmond, Assistant Attorney General. The
3 proceedings were recorded by Lesley Gray of Evergreen Court
4 Reporting. Witnesses were sworn and testified. Exhibits were
5 examined. Arguments were made and memoranda filed. From the
6 testimony, exhibits and contentions, the Pollution Control Hearings
7 Board enters the following:

8 PRELIMINARY PROCEDURE

9 1. The appeal herein was filed with the Board on March 4,
10 1987. The action appealed was the issuance by the Department of
11 Ecology on February 6, 1987, of Notice of Penalty Incurred and Due No.
12 DE 87-112. The Notice assessed a penalty of \$5,000 stating, in part:

13 The basis for this penalty is that Georgia
14 Pacific Corporation exceeded the standard for
15 average hourly ambient SO₂, as set forth in
WAC 18-56-030(2), on November 19, 1986 as
follows:

16 HOURLY STARTING	SO ₂ CONCENTRATION
17 6:00 a.m.	0.55 ppm
7:00 a.m.	0.37 ppm
18 8:00 a.m.	0.51 ppm

19 2. On September 22, 1987, Ecology filed a Motion for Partial
20 Summary Judgment or, in the alternative, for Order Conclusively
21 Establishing Admitted Facts.

22 3. On October 5, 1987, Georgia Pacific filed its documents in
23 opposition to the Motion.
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2 4. On October 6, 1987, Ecology filed its response to Georgia
3 Pacific's opposition.

4 5. On October 14, 1987, the Board granted Ecology's Motion,
5 holding that the admissions of Georgia Pacific had eliminated any
6 genuine issue of material fact on the violations asserted and that
7 under the strict liability regime of the statute (RCW 70.94.431),
8 the Corporation was liable to penalty as a matter of law. The
9 hearing in this matter was, therefore, limited to the reasonableness
10 of the penalty assessed.

11 The Board's Order Granting Respondent's Motion for Partial
12 Summary Judgment is attached hereto as Attachment A and by this
13 reference incorporated herein.

14 In connection with the remaining issue over the amount of the
15 penalty, the Board makes the following

16 FINDINGS OF FACT

17 I.

18 Appellant Georgia Pacific Corporation operates a paper, pulp and
19 chemical complex in Bellingham, Washington, on the bay, adjacent to
20 the downtown business district.

21 II.

22 Respondent Department of Ecology is an agency of the State of
23 Washington which has authority to regulate the emission of air
24

1
2 contaminants.

3 III.

4 On November 19, 1986, emissions from Georgia Pacific's
5 installation caused average readings for three consecutive hours of
6 0.55 ppm, 0.37 ppm, and 0.51 ppm, recorded on the ambient air
7 monitor maintained by the Corporation.

8 WAC 18-56-030, in pertinent part, reads as follows:

9 Sulfur oxide in the ambient air, measured as
10 sulfur dioxide ..., shall not exceed the
11 following concentrations averaged over the
specific time periods:

12 "... (2) Twenty-five one-hundredths parts per
13 million by volume average for any one hour not
14 to be exceeded more than two times in any
consecutive seven days..."

15 IV.

16 The ambient air monitor which recorded the exceedances is
17 located about 15 feet above ground level, on a building at the
18 boundary of the Georgia Pacific complex next to a public street
19 (Chestnut Street). The immediate neighborhood is urbanized, devoted
20 to commercial and industrial uses.

21 On November 19, 1986, during the hours in question--6 to 9
22 a.m.--emissions from the mill were moving generally in a northerly
23 direction which would carry them past the monitor into the city.

V.

On December 10, 1986, Georgia Pacific's Director of Environmental Control sent a letter to the Northwest Air Pollution Authority (NWAPA) discussing the SO₂ exceedences on November 19, 1986. NWAPA forwarded a copy of this letter to Ecology. It stated, in part:

In reviewing the cause of the violation with our operating people I learned the source was flue gas discharged from the stack for No. 8 and No. 10 boilers in the steam plant. No. 10 boiler was on fuel oil at the time and had a dirty nozzle which was cleaned during the violation period. I physically observed the stack plume was more opaque than normal and called the supervisor of the steam plant to alert him of the stack condition. He took immediate steps to correct the boiler upset.

We are installing a monitoring device to alert the steam plant operators so they can make necessary control adjustments to prevent SO₂ violations.

Ecology accepted this explanation as to cause, in exercising its regulatory authority in this case.

VI.

On the date in question, recorders showing SO₂ concentrations at the ambient air monitor were located both at the monitor and inside the control room in the digester building. The control room is staffed on a twenty-four hour basis.

Nonetheless, the excessive SO_2 readings were not detected until the problem had persisted into its third hour. Then, the problem was discovered only as a result of visual observations of the stack plume by environmental control personnel.

VII.

Sometime in 1987, a recorder showing SO₂ at the ambient monitor was installed in the steam plant. Alarms have also been added to the recorders in both the steam plant and the digester building. An instantaneous reading of 0.3 ppm will trigger the alarms.

VIII.

The steam plant at Georgia Pacific's operation in Bellingham has ten boilers, some of which burn fossil fuel and some of which use hog fuel (wood). Emissions from the hog fuel boilers are controlled by a bag house. The fossil fuel boilers operate without air pollution controls.

In April of 1981 in response to a series of ambient air SO_2 violations, the company installed a tall stack (115 feet high) for the fossil fuel boilers, in an attempt to avoid violations at the ambient air monitor by promoting dispersion of contaminants into the upper air.

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2 From the installation of the tall stack until November 19, 1986,
3 there were no ambient air SO₂ violations attributed to the steam
4 plant.

5 IX.

6 There are numerous potential SO₂ emission units on the Georgia
7 Pacific site. The data on wind direction during the hours of
8 violation here do not necessarily point to the steam plant as the
9 origin in this case. But operational data appear to eliminate other
10 sources, and the visual observations of the environmental staff
11 support the conclusion that the excessive SO₂ emissions emanated
12 from the tall stack.

13 X.

14 The fossil fuel boilers can use either natural gas or fuel oil.
15 From 1980 through late 1983 fuel oil was used exclusively. Then,
16 from December, 1983, to July, 1986, natural gas was used. Natural
17 gas contains negligible amounts of sulfur and, therefore, its use
18 presents little or no risk of SO₂ violations.

19 In the summer of 1986, the company, for economic reasons,
20 switched back to using sulfur-bearing fuel oil. Fuel oil was being
21 used on November 19, 1986.

22 During the early morning hours on that day, the spray nozzle for
23 the main burner of the No. 10 boiler was taken off-line for
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1
2 cleaning. While it was being cleaned, an auxiliary burner was used
3 to maintain boiler temperature.

4 XI.

5 During the SO₂ violations, the tall stack plume was observed
6 to be sinking and moving to the low-level monitor site, rather than
7 rising and dispersing as is usual. The company's environmental
8 staff postulates that the reduced use of fuel oil by the auxiliary
9 burner (with its small nozzle), produced a cooler-than-ordinary
10 plume which, atypically, sank to the ground.

11 XII.

12 In Georgia Pacific Corporation v. DOE and NWAPA, PCHB 80-210,
13 80-216, 80-230 and 81-3 (April 24, 1981), this Board affirmed 43
14 civil penalties totaling \$10,075 for violations of the ambient air
15 SO₂ standard by Georgia Pacific in 1980. Of these, 12 violations
16 were found attributable to the company's power boiler (steam plant)
17 facilities.

18 On January 13, 1981, Georgia Pacific was assessed a penalty of
19 \$250 for violating the ambient SO₂ standard and on May 7, 1981,
20 was assessed a penalty of \$2,500 for violating the same standard.
21 On September 1, October 23, and December 2, 1985, civil penalties
22 aggregating \$4,000 were assessed against Georgia Pacific for
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2 violations of the ambient SO₂ standard. All of the penalties
3 assessed in 1981 and 1985 were paid by the company. Until the
4 present case, none of the incidents following installation of the
5 tall stack have been attributed to emissions from the steam plant.

6 XIII.

7 Any Conclusion of Law which is deemed a Finding of Fact is
8 hereby adopted as such.

9 From those Findings the Board comes to the following

10 CONCLUSIONS OF LAW

11 I.

12 The Board has jurisdiction over these persons and these
13 matters. Chapters 43.21B RCW and 70.94 RCW.¹

14 II.

15 RCW 70.94.431 provides for the assessment of civil penalties for
16 the violation of regulations implementing the state Clean Air Act.
17 Each violation is a separate offense.

18
19
20 ¹The bifurcated jurisdiction of sulfite pulping mills between
21 regional air pollution authorities and Ecology which gave rise to
22 argument in Georgia Pacific v. Doe and NWAPA, PCHB Nos. 80-210 et al
23 (1981), was eliminated by the repeal of WAC 173-410-091 on April 15,
24 1983. Ecology now has jurisdiction over the entire manufacturing
25 facility. RCW 70.94.395, WAC 173-410-012.

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2 In 1984, the Legislature amended this section to increase the
3 maximum penalties, authorizing fines up to \$1,000 per day by all air
4 pollution control enforcement entities, and additionally authorizing
5 Ecology to impose fines of up to \$5,000 per day "if the director
6 determines that the penalty is needed for effective enforcement of
7 this Chapter." Section 2, Chapter 255, Laws of 1984.

8 This amendment removed a prior penalty ceiling of \$250 on
9 individual air pollution violations, reflecting an intent to treat
10 actions contravening air pollution control laws with increased
11 seriousness.

12 III.

13 The penalty in this case was issued under the authority of the
14 new subsection authorizing the \$5,000 maximum. RCW 70.94.431(2).
15 We believe Ecology's choice to proceed under this provision is a
16 matter of prosecutorial discretion. Where the fact of violation is
17 established, the only issue for this Board concerning a penalty is
18 whether the amount is appropriate, in light of the objects of the
19 statute and the remedial purposes of the penalty mechanism.

20 IV.

21 The purpose of the Clean Air Act in both "prevention and
22 control" of air pollution. RCW 70.94.011. The civil penalty section
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2 fits into the program established to these ends as a means for
3 influencing behavior, both of the violator and of the regulated
4 community in general.

5 On considering the amount of an air pollution penalty, the Board
6 is guided by several factors bearing on its reasonableness,
7 including:

- 8 1) The nature of the offense.
9 2) The prior behavior of the violator.
10 3) Actions taken by the violator to correct the problem,
11 Puget Chemco v. PSAPCA, PCHB No. 84-245 et al (1985).

12 V.

13 The nature of the offense involves both the gravity of the
14 violation and the circumstances of its occurrence.

15 Here the standard violated is not a technology-based emission
16 limitation. It is an ambient air quality standard, establishing the
17 concentration, exposure time and frequency of occurrence of a
18 contaminant which cannot be exceeded for the protection of human
19 health and safety. See Jensen's Kent Prairie Dairy v. DOE, PCHB No.
20 84-240 (1984).

21 Moreover, the circumstances of the violation do not present a
22 picture of an occurrence beyond the immediate capability of the
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2 company to control. The emissions became a violation because of
3 their duration. At the time of the event, monitors and recorders
4 displaying the problem were installed and functioning where company
5 personnel on shift could and should have become aware of what was
6 happening. The violation resulted from an operational failure.
7 Such circumstances, showing ready avoidability, support a
8 substantial penalty.

9 VI.

10 The prior behavior of the violator in this instance also points
11 toward a substantial fine. The problem of ambient air SO₂
12 violations from the Georgia Pacific complex is an old one. In
13 viewing the history of violations, we are concerned with recurrence
14 of the prohibited result, not with the multiplicity of points of
15 origination of the problem with the complex. See Weyerhaeuser v.
16 DOE, PCHB No. 86-224 et al. (1988). WAC 173-410-021(24) from the
17 regulation for Sulfite Pulping Mills defines "source" as follows:

18 "Source means all of the emissions unit(s)
19 including quantifiable fugitive emissions, which
20 are located on one or more contiguous or
21 adjacent properties, and are under the control
22 of the same person (or persons under common
23 control) whose activities are ancillary to the
24 production of a single product or functionally
25 related group of products."

26 The various prior penalties incurred by Georgia Pacific are,
27 thus, all penalties for ambient SO₂ violations from the same air

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2 pollution "source". The company has established a large and
3 complicated industrial operation which has the potential for air
4 emissions harmful to the public. The complexity of the installation
5 ought not to serve as a defense to penalties for recurrent
6 violations of standards designed to protect the public.

7 VII.

8 The company here has taken steps to solve the operational
9 failure involved in the instant violation by the installation of
10 more equipment showing what is being measured at the monitor, and
11 alarms which will alert persons on shift to the onset of
12 violations. Further, the company can be confident that the steam
13 plant will not cause an SO₂ problem whenever natural gas is burned.

14 Nonetheless, the potential for violations remains from the
15 uncontrolled tall stack, if unusual conditions of operation and
16 meteorology combine as they did in the instant case. When and if
17 this happens, it will be up to the vigilance of personnel on the
18 scene to prevent levels of SO₂ from exceeding levels set for human
19 protection.

20 Under these circumstances, and in light of the serious nature of
21 the offense and the long history of such violations, we do not
22 believe the company's remedial actions call for a reduction of the
23 penalty.

VIII.

We conclude that the \$5,000 penalty is reasonable and hold that it should be upheld.

IX.

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters the following

ORDER

Notice of Penalty Incurred and Due, No. DE 87-112, issued by the
Department of Ecology to Georgia Pacific Corporation is affirmed.

DONE this 31st day of August, 1988.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Presiding



JUDITH A. BENDOR, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PCHB No. 87-45

(15)

Library

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WEYERHAEUSER COMPANY,)	
)	
Appellant,)	
	)	PCHB Nos. 86-219 & 87-49
v.)	
)	
PUGET SOUND AIR POLLUTION	)	FINAL FINDINGS OF FACT,
CONTROL AGENCY,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.)	

THESE MATTERS are the appeals of two \$400 civil penalties for alleged opacity exceedances on August 26, 1986 (Civil Penalty No. 6017, our No. PCHB 86-219), and on December 3, 1986 (Civil Penalty No. 6617, our No. PCHB 87-49), in alleged violation of WAC 173-400-040(10). The two appeals were consolidated. A formal hearing was held before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman and Presiding, Members Wick Dufford and Judith A. Bendor, on April 3, 1987, at the Board's offices in Lacey, Washington.

Appellant Weyerhaeuser Company was represented by its Attorneys, Susan L. Preston and Michael Thorp. Respondent Puget Sound Air Pollution Control Agency ("PSAPCA") was represented by its Attorney

1 Keith D. McGoffin. Betty Koharski of Gene Barker & Associates
2 recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined.
4 Argument was made. From the testimony, evidence and contentions of
5 the parties, the Board makes these

6 FINDINGS OF FACT

7 I

8 Appellant Weyerhaeuser Company is a corporation, doing business in
9 the State of Washington. It owns and operates a kraft paper mill in
10 Everett, Washington.

11 II

12 Respondent PSAPCA is an activated air pollution authority with
13 responsibility for carrying out a program of air pollution prevention
14 and control under the Washington Clean Air Act.

15 III

16 By the adoption of statewide standards for kraft pulping mills,
17 the State Department of Ecology assumed jurisdiction over such mills
18 and established separate emission standards for them. (See WAC
19 173-405-012(1)). Thereafter, the State delegated to PSAPCA, (Order of
20 Delegation No. 75-49), among other matters, the authority to
21 investigate and enforce State air standards for opacity at kraft
22 mills. The relevant standard is set forth in WAC 173-405-040(10)
23 which prohibits any person (including a corporation) from causing or
24

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 86-219 & 87-49

1 allowing emissions from any kraft recovery furnace, smelt dissolver
2 tank or line kiln which has an average opacity greater than 35% for
3 more than six consecutive minutes within a one hour period.

4 Opacity is defined in the regulations as:

5 the degree to which an object seen through a plume is
6 obscured, stated as a percentage. WAC 173-405-021(16).

7 Standardized procedures have been developed to observe plumes and
8 determine their opacity. Such procedures call for the inspector's
9 observing the plume approximately perpendicular to it, and with the sun
10 within a 140 degree sector behind him/her. It is undisputed that the
11 opacity standard is violated by readings exceeding 35% for the
12 prescribed time only when the proper observation procedures were
13 followed.

14 IV

15 The Department of Ecology conducts Plume Evaluation and
16 Certification courses, which the PSAPCA inspector who made the
17 observations at issue has taken and successfully completed numerous
18 times in his eight years as an air pollution inspector. Nearest to
19 the events in question, he passed the test for both black and white
20 smoke on August 8, 1986, and on October 3, 1986. The training courses
21 have included instruction on recognizing the difference between wet and
22 dry plumes and on reading opacity at points where the reading does not
23 reflect the observation of vapor.

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 86-219 & 87-49

(3)

V

On August 26, 1986 the PSAPCA inspector drove to the vicinity of Weyerhaeuser's Everett plant. At 11:35 Pacific Daylight Time (10:35 Pacific Standard Time), the inspector positioned himself approximately 1,200 feet south of the plant, at Medora Way near Skyline Drive in Everett. His contemporaneous notes show the wind from the north. His recollection later changed, and he testified to wind from the northwest. He observed a brownish plume emanating from the main stack (subject to the 35% opacity standard). The sky was blue and clear. At 11:48 a.m. PDT the inspector took two photographs of the plume. Then he recorded an opacity of 50% for twelve minutes between 11:48 a.m. and 12:00 p.m.

VI

As a result of the observations on August 26, PSAPCA sent appellant Notice of Violation (No. 022251) and thereafter, Notice and Order of Civil Penalty (No. 6577) assessing \$400 for the alleged violation of WAC 173-405-040(10). Feeling aggrieved by this decision, appellant appealed to this Board on December 10, 1986 and the appeal became our PCHB No. 86-219.

VII

Upon evaluating all the evidence, we find that the inspector's opacity reading on August 26, did not follow the standard procedures. The plume was drifting toward him to such an extent that it cannot be

1 said that it was approximately perpendicular to his line of
2 observation. Further, we were not convinced that the sun was with the
3 140 degree sector to his back.

4 VIII

5 On December 3, 1986, at about 12:33 p.m. (PDT), respondent's
6 inspector, driving south on Freeway I-5, noticed a plume rising from
7 the same plant, emanating again from the main stack. The inspector
8 drove to a location 1,200 feet from the plant and placed himself
9 perpendicular to the direction of the plume. The sun was within the
10 140 degree sector behind him. The wind was calm. The tan dense plume
11 rose several hundred feet into the air. The sky was primarily blue,
12 with a high thin layer of white clouds. The inspector recorded
13 opacities ranging from 60% to 70% for a fifteen minute period from
14 12:33 p.m. through 12:47 p.m. At 12:33 p.m. the inspector took two
15 photographs which clearly show the plume.

16 IX

17 As a result of the December 3, 1986 observation, respondent PSAPCA
18 issued Notice of Violation (No. 022271), and sent a Notice and Order of
19 Civil Penalty (No. 6617) assessing \$400 for the alleged violation of
20 WAC 173-405-040(10). Feeling aggrieved by this decision appellant
21 appealed to this Board on March 2, 1987 and the appeal became our
22 number PCHB NO. 87-49.

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 86-219 & 87-49

1 X

2 We are convinced by a preponderance of the evidence that the
3 observation of opacity on December 3 followed the proper procedures in
4 deriving the readings taken.

5 XI

6 Appellant asserts that the inspector's readings on both August 26
7 and December 3, 1986, probably included moisture in the plume. We find
8 to the contrary. In both cases the plume appeared brownish or tan in
9 color, not white. Moreover, the inspector credibly explained his
10 efforts to avoid reading water vapor in the plumes.

11 We find appellant's evidence, involving non-contemporaneous
12 observations from photographs, regarding possible moisture in the
13 plumes to be unpersuasive.

14 XII

15 Appellant measures mass emissions (primarily particles) by
16 continuous monitoring equipment in its main stack. Efforts have been
17 made at various times to correlate this measurements with visual
18 opacity readings. Using these conditions, the company's witnesses were
19 of the opinion that the opacity at the times in question should have
20 been below the 35% standard.

21 No opacity, readings were taken by company personnel at the same
22 times when visual observations were being made by PSAPCA's inspector.
23 We do not find inferences from correlations derived on other occasions
24 sufficiently compelling to overcome the evidence of direct visual
25

1 observations by a trained observer using proper observation techniques.

2 XIII

3 Any Conclusion of Law which should be deemed a Finding of Fact is
4 hereby adopted as such.

5 From these Findings the Board comes to the following

6 CONCLUSIONS OF LAW

7 I

8 The Board has jurisdiction over the persons and the subject matter
9 of this proceeding. RCW 43.21B.110.

10 II

11 Respondent has the burden of proving that the violations occurred.

12 III

13 We conclude that respondent PSAPCA failed to sustain its burden
14 regarding the alleged violation on August 26, 1986. (PCHB No.
15 86-219). Therefore, that penalty must be reversed.

16 IV

17 We conclude respondent did sustain its burden regarding the alleged
18 violation of December 3, 1986. (PCHB No. 87-49). An opacity emission
19 violation of WAC 173-405-040(10) did occur on that date.

20 V

21 Appellant's assertions about readings of moisture misconceive the
22 nature of the opacity standard. The standard does not apply

23 when the presence of uncombined water is the only reason
24 for the opacity of the plume to exceed the applicable
25 maximum. WAC 173-405-040(10). (Emphasis added.)

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB Nos. 86-219 & 87-49

(7)

1 For the uncombined water exception to apply, the emissions must be
2 free of all particulate contaminants. Chemithon Corp. v. PSAPCA, 19
3 Wn. App. 689, 577 P.2d 606 (1978); Chemithon II, 31 Wn. App. Wn. App.
4 276 (1982). The burden of establishing this defense is on the
5 appellant. Such was not established here. Indeed, the mass emissions
6 data shows the opposite.
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ORDER

Notice and Order of Civil Penalty No. 6577 is REVERSED. Notice and Order of Civil Penalty No. 6617 is AFFIRMED.

DONE at Lacey, Washington this 29th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

Lawrence S. Faulk 6/29/88
LAWRENCE S. FAULK, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Judith A. Bendor
JUDITH A. BENDOR, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

UNIVERSITY MECHANICAL CONTRACTORS,)
INC., a Washington Corporation;)
ADVANCED COMBUSTION SYSTEMS,)
an Oregon Corporation; and ALSID,)
SNOWDEN & ASSOCIATES, INC.,)
d/b/a AMERICAN SERVICES ASSOCIATES,)
a Washington Corporation,)

Appellants,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)

Respondent.)

PCHB NO. 87-56

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

On March 13, 1987, Advanced Combustion Systems, University Mechanical Contractors, Inc., and Alsld, Snowden & Associates, Inc., d/b/a American Services Association, filed a Notice of Appeal with the Pollution Control Hearings Board, challenging the Puget Sound Air Pollution Control Agency's ("PSAPCA") Final Order to Prevent Construction, (Notice of Construction No. 2793) dated February 19, 1987), of an incinerator with heat recovery unit at the U.S. Veterans Administration Hospital at 4435 Beacon Avenue South in Seattle,

1 Washington. Appellants simultaneously filed a Motion and Memorandum
2 in Support of an Early Hearing Date. The motion was not opposed and
3 an early hearing date was scheduled.

4 On April 1, 1987, PSAPCA filed a Motion for Summary Judgment and
5 supporting Memorandum and Affidavits, to which appellants filed a
6 response on April 10, 1987. Argument was heard and the motion was
7 denied on April 20, 1987.

8 On April 3, 1987, appellants filed a Motion for Interim Relief,
9 requesting that at the conclusion of the hearing PSAPCA be directed to
10 authorize the operation of the incinerator, pending the Board's final
11 order in this appeal. PSAPCA opposed the motion, filing its response
12 on April 20, 1987. Argument was heard and the motion was denied on
13 that date.

14 On April 3, 1987, appellants also moved to strike the legal issue
15 regarding Best Available Control Technology ("BACT"). Argument was
16 heard and the motion was also denied.

17 The formal hearing on the merits was held on April 3, 1987 and
18 continued to April 20, 1987. Present for the Board were Members
19 Judith A. Bendor (Presiding), Lawrence J. Faulk (Chair), and Wick
20 Dufford, Member. Appellants were represented by Attorney Charles K.
21 Douthwaite. Respondent was represented by Attorney Keith D.
22 McGoffin. Court reporters with Gene Barker & Associates recorded the
23 proceedings.
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At the hearing witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. Parties subsequently filed Proposed Findings, Conclusions and Order. From the testimony, exhibits, filings, and arguments of the parties, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency ("PSAPCA") is an activated air pollution control authority under the terms of the State of Washington Clean Air Act, empowered to monitor and enforce emission standards for air pollutants, and to review and approve new sources of air pollution. PSAPCA has filed with the Board certified copies of its Regulation I and II, of which the Board takes official notice.

II

University Mechanical Contractors, Inc., ("University") is a Washington corporation. Advanced Combustion Systems ("Advanced") is an Oregon corporation with its principal place of business in Bellingham, Washington. Alsid, Snowden & Associates, Inc., d/b/a American Services Associates ("American") is a Washington corporation. The Veterans Administration ("VA") is not a party to this appeal.

III

The VA contracted with University to have an incinerator installed in its hospital in Seattle, Washington. University in turn subcontracted with Advanced to manufacture the unit and participate in installing it. American was hired to perform emission source tests on

1 the incinerator. The incinerator is a heat recovery system designed
2 to burn hospital wastes.

3 IV

4 In October 1983, United Industries Corporation ("United") wrote a
5 two-page letter to PSAPCA, informing the authority it was serving as a
6 consultant to the VA in the design and preparation of specifications
7 for an incinerator with waste heat recovery for the VA hospital. The
8 letter generally outlined certain proposed features of the
9 incinerator, including a 1,200 pound per hour charge rate, and asked
10 PSAPCA about emissions limitations, required control technology, and
11 possible emission offsets available.

12 James Pearson for PSAPCA responded, (letter dated October 27,
13 1983), stating in pertinent part that:

- 14 1. [Particulate] [E]mission limits for the
15 proposed system are 0.05 grains particulate
16 matter per dry standard cubic foot, corrected
to 12% CO₂ (exclusive of CO₂ from
auxiliary fuel).
- 17 2. The proposed system must incorporate "best
18 known available and reasonable methods of
19 emission control" (BACT); reference Section
6.07(b)(2) of Regulation I. . . .

20 The letter also provided some information regarding emissions
21 offsets.

22 V

23 The incinerator design was completed in January 1984. Bids for
24 construction were solicited on November 15, 1984.

VI

On February 22, 1985, United wrote PSAPCA a one-page letter, informing the agency it was assisting the VA in preparing bid specifications for "a new incinerator system," and that two potential systems were being considered: a heat recovery incinerator, and one with no means of heat recovery. Both systems were identified by United to have a maximum charge rate of 1,200 pounds per hour. United asked PSAPCA, among other matters, what particulate emissions standards would apply, and whether Best Available Control Technology would be required.

Harry L. Watters for PSAPCA (by letter dated March 1, 1985), answered in relevant part:

1. What particulate matter emission standards would apply?

The standard for the incinerator with heat recovery is a properly sized and designed baghouse control or equivalent. To demonstrate equivalency, the control system should be capable of meeting 0.02 grains per standard dry cubic foot (gr/dscf) calculated to 12 percent carbon dioxide (exclusive of carbon dioxide from auxiliary fuel). This includes the back half of the Method 5 source test train.

[. . .]

2. Would Best Available Control Technology (BACT) be required, and, if so, what would constitute BACT?

Yes. BACT for particulate matter (see response to no. 1 above) is more stringent than that required by Section 9.09 of Regulation I. Section 6.07(b)(2) requires that a new installation incorporate "best known and reasonable methods of emission control." This term is defined in Section 1.07(h) of Regulation I. A similar requirement is mandated by RCW 70.94.152. A copy of Regulation I is enclosed.

VII

The construction contract was awarded on May 9, 1985, and the winning bidders were give notice to proceed on June 4, 1985.

VIII

On March 14, 1986, E. L Loveland of the VA wrote PSAPCA for confirmation of an oral communication that the particulate matter emission standards stated in Pearson's letter of October 27, 1983 would apply. On March 26, 1986, in response, PSAPCA (by Harry L. Watters) wrote Loveland stating that the October 27, 1983, PSAPCA letter should be followed, rather than the March 1, 1985, one.

IX

On May 9, 1986, in response to a request, PSAPCA's Watters sent the VA forms for filing a Notice of Construction. The accompanying letter stated, in part, the following:

As noted in Mr. James Pearson's letter, dated October 27, 1983:

"Emission limits for the proposed system are 0.05 grains particulate matter per dry standard cubic foot, corrected to 12 percent CO₂ (exclusive of CO₂ from auxiliary fuel). This includes the impinger catch of the Method 5 sampling train." This was determined to be best available control technology (BACT) for this unit. Based on Agency experience, it is difficult for incinerators to achieve this level of particulate control without control equipment. Also enclosed is a copy of Regulation I. If you have any questions, please call me [. . .].

X

A Notice of Construction (Application No. 2793) was submitted to PSAPCA on July 9, 1986. On forms accompanying the application, the

1 equipment was identified as an incinerator with heat recovery boiler,
2 emergency dump stack, and with capacity of and waste quantity to be
3 burned - 900 pounds per hour.

4 An unsigned environmental checklist was concurrently submitted,
5 which showed the VA as the project proponent, listed 800 pounds as the
6 amount the incinerator would be able to handle, and recited that
7 emissions would be less than existing.

8 XI

9 PSAPCA, by letter dated July 17, 1986, requested specific
10 information to supplement the Notice of Construction, including a copy
11 of the Architects and Engineers' designs and specifications, an
12 operation and maintenance manual, information on the use of the
13 emergency dump stack, source test data, and a chronology regarding bid
14 solicitation and award. The letter concluded that the incinerator
15 "was installed without approval."

16 At the hearing, appellants did concede that the incinerator was
17 built and installation begun before the Notice of Construction was
18 filed.

19 The VA replied on July 30, 1987, providing some of the
20 information. The letter advised that the construction contractor had
21 contractual responsibility to obtain necessary permits and licenses,
22 and to furnish a system meeting all specifications; and that the
23 architect/engineer had contractual responsibility to meet Federal,
24 State and local standards and regulations. Title to the incinerator
25
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1 was to pass only upon the Government's acceptance. At the time of the
2 hearing, title had not passed to the VA.

3 XII

4 On August 6, 1986 PSAPCA issued an "Order to Prevent Construction
5 Notice of Construction No. 2793. In that Order, PSAPCA stated that
6 the proposed incinerator had not been demonstrated to be capable of
7 "consistently meeting" the particulate emission standard of Regulation
8 I, at Section 9.09(a)(2). The Agency concluded that three reports of
9 previous source tests of a purportedly similar incinerator at Fort
10 Lewis had failed to show compliance with the 0.05 grains standard.
11 The agency also provided an analysis which concluded that two source
12 tests provided by applicant from another incinerator were not
13 acceptable.

4 XIII

15 Appellants petitioned for reconsideration and requested permission
16 to conduct source testing in accordance with Agency procedure on the
17 incinerator in question. On August 27, 1986, PSAPCA granted approval
18 to conduct a source test, and required a source test plan to be
19 submitted two weeks before the test. The plan was submitted to
20 PSAPCA.

21 After a preliminary test, a source test was conducted on December
22 19, 1986 by Wesley Snowden, a licensed engineer and principal with
23 American, and his assistants. Waste was loaded at 7:40 a.m. and
24 burning began. Three "runs" of the test were conducted, with the
25
26

1 first emission sampling done at 8:17 a.m., and final sampling done at
2 1:18 p.m. Emissions were measured only from the exhaust stack from
3 the heat exchange boiler. The so-called "dump" stack was not directly
4 measured for particulates. PSAPCA's air pollution source analyst was
5 present during various times of the test.

6 VA personnel participated in the loading process, but appellants
7 conceded that VA personnel had not been trained, as of that date, to
8 operate the incinerator. To some extent, Advanced's project engineer,
9 K. Edward Dahl, assisted in loading the incinerator, an operation
10 involving placement of a cart full of refuse in position next to the
11 incinerator and pressing three buttons in sequence. Except for
12 loading procedures the incinerator operated under the direction of its
13 built-in automatic controls during the source test; neither Mr. Dahl,
14 Mr. Snowden, nor their assistants made adjustments to the incinerator
15 itself during the test.

16 XIV

17 American compiled the data collected during the source test and
18 produced a report showing that the incinerator emitted particulates at
19 an average rate of 0.042 grains per dry standard cubic foot during the
20 test. The source test report was received by PSAPCA from the VA On
21 January 15, 1987.

22 XV

23 PSAPCA informed the VA and University (by letter dated January 26,
24 1987, enclosing memos analyzing the test), that the test did not
25
26

1 demonstrate compliance with Agency requirements.

2 On February 19, 1987, PSAPCA, pursuant to 6.07(c) of Regulation I,
3 issued its Final Order to Prevent Construction, stating that it had
4 not been demonstrated that the proposed incinerator was capable of
5 "consistently meeting the standard in Section 9.09(a)(2) of Regulation
6 I." PSAPCA stated it based this conclusion on its letters of August
7 6, 1986 and January 26, 1987, and accompanying memos.

8 From this Order, the parties filed their appeals on March 13,
9 1987.

10 XVI

11 PSAPCA's objections to the December 19, 1986, source test were, in
12 part, based on the perception that the incinerator was being operated
13 and adjusted by Mr. Dahl whose sophistication in such matters exceeds
14 that to be expected of VA hospital personnel and, therefore, the test
15 did not present truly representative operating conditions. The
16 testimony convinced us that Mr. Dahl's involvement had no demonstrable
17 effect on the test results.

18 PSAPCA was also concerned about the absence of a damper on the
19 "dump" stack. Without a damper, the agency thought, the "dump" stack
20 emissions should have been measured. Expert testimony persuaded us
21 that the omission of a "dump" stack damper is an appropriate design
22 feature of this particular incinerator for safety reasons. Further,
23 we find that the lack of such a damper had no effect on emissions
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1 during the test, that all gas was pulled through the heat exchange
2 boiler, and that the measurement of the exhaust stack only was
3 appropriate.

4 PSAPCA additionally asserted that several operational aspects of
5 the testing procedure were deficient on a technical basis. We were
6 convinced that any technical problems with the test did not bias the
7 results.

8 In sum, we find that the test results achieved were fairly
9 representative of the unit's operation and that the source test
10 conducted on December 1986, was valid for the purposes of determining
11 the ability of the incinerator to comply with PSAPCA's emission
12 standard for particulate matter.

13 XVII

14 Appellants' experts admitted that better results -- perhaps .02 or
15 .03 grams -- could be achieved if a baghouse were added to the
16 incinerator installation.

17 Baghouses are a known and available means of emission control.
18 The incinerator at another large hospital in Seattle -- Swedish
19 Hospital -- is operating with an installed baghouse.

20 XVIII

21 A rough estimate is that the addition of a baghouse to the VA
22 incinerator would add \$80,000 to \$100,000 to the cost of the
23 installation and double or triple the maintenance costs. However, no
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1 rigorous cost analysis of these matters was presented; nor was
2 information on costs experienced elsewhere presented for incinerators
3 performing similar functions.

4 XIX

5 Any Conclusion of Law hereinafter determined to be a Finding of
6 Fact is hereby adopted as such.

7 From these Facts, the Board comes to these.

8 CONCLUSIONS OF LAW

9 I

10 The Board has jurisdiction over these parties and these issues.
11 Ch. 43.21B RCW. Appellants have the burden of proof in this case.

12 II

13 The Washington Clean Air Act authorizes the Notice of Construction
14 process: RCW 70.90.152. By this section, the Legislature has, in
15 effect, provided for a building permit requirement for new air
16 contaminant sources.

17
18 The standard for approval under RCW 70.94.152 is whether the
19 proposed air contaminant source

20 will be accord with applicable rules and
21 regulations in force pursuant to this chapter and
22 will provide all known available and reasonable
23 methods of emission control.

1 Thus, approval of a new source is subject both to demonstrated
2 compliance with numerical emission standards established by regulation
3 and to a requirement for installing advanced technology.

4 The level of performance needed to meet the emission standards
5 part of this dual requirement may not be sufficient to meet the
6 technology standard. Satisfying the latter may necessitate doing
7 better than simply meeting the applicable numerical emission
8 standard. See, Weyerhaeuser v. Southwest Air Pollution Control
9 Authority, 91 Wn.2d 77, 82, 586 P.2d 1163 (1978).

10 III

11 PSAPCA has modeled its regulations on the enabling statute.
12 PSAPCA Regulation I at Section 6.03(b) states, in pertinent part,
13 that:

14 "no person shall construct, install or establish a new
15 air contaminant source [. . .] unless a 'Notice of
16 Construction and Application for Approval' [. . .]
17 has been filed and approved by the Agency in
18 accordance with Sections 6.07(a) or 6.11 [. . .].

19 Regulation I at Section 6.07 states in pertinent part:

20 (b) No approval [to operate] will be issued unless .

21 (1) The source is designed and will be installed
22 to operate without causing a violation of the
23 emission standards.

24 (2) The source incorporates best available
25 control technology and will meet the requirements
26 of all applicable Standards of Performance
promulgated by the United States Environmental
Protection Agency. [emphasis added]

1 IV

2 The emission standards for this incinerator are to be found
3 at Regulation I, Section 9.09, which states in pertinent part:

4 It shall be unlawful for any person to cause or
5 allow the emission of particulate matter if
6 [. . .] the particulate matter discharged into
7 the atmosphere from any single source exceeds the
8 following weights at the point of discharge:

9 [. . .]
10 (a)(2)

11 After March 1, 1986, in refuse burning equipment
12 having heat recovery equipment, 0.05 grains for
13 each standard cubic foot of exhaust gas, adjusted
14 or calculated to 12% carbon dioxide.

15 V

16 We conclude, on the basis of the valid source test of December 19,
17 1986, that the incinerator in question has been demonstrated to be
18 capable of operating in accord with applicable emission standards and
19 hold that the denial of the Notice of Construction for failure to make
20 such demonstration was an error.

21 VI

22 However, we conclude that compliance with the applicable
23 technology standard has not been demonstrated, and therefore, decide
24 that PSAPCA's denial of the Notice of Construction must be upheld.

25 VII

26 The technology standard is defined by PSAPCA Regulation I at
Section 1.07 (h) under the rubric "Best Available Control Technology
(BACT)". PSAPCA's definition substantially tracks the definition of

1 BACT provided in the State's regulations at WAC 173-403-030(8).

2 The WAC definition, however, expressly adds:

3 The requirement of RCW 70.94.152 that a new
4 source will provide "all known available and
5 reasonable methods of emission control" is
6 interpreted to mean the same as best available
7 control technology.

8 We conclude that the technology requirement of RCW 70.94.152 and
9 BACT mean the same thing in the context of this case.

10 VIII

11 The technology that is required is one that is "known", and
12 "available", as opposed to newly developed by the applicant.
13 Weyerhaeuser, supra, at 81-82. It also has to be "reasonable"; i.e.,
14 economically and technologically feasible Id. The mere fact that a
15 system might cost more to install and operate does not mean under the
16 law that it is not economically feasible. Id., at 85.

17 We conclude that the incinerator in question does not incorporate
18 BACT. Particulate emissions can be further lowered by use of a
19 baghouse - a known and available method. No evidence was presented
20 that use of a baghouse is technologically infeasible. Appellant's
21 rough estimate of increased cost is insufficient by itself to prove
22 that the incinerator is not economically feasible.

23 IX

24 Appellants appear to be contending (hence the lengthy chronology)
25 that PSAPCA has misled them such that the Agency should be estopped

1 from requiring BACT. It is evident that PSAPCA's communications have
2 not been a model of clarity.

3 But it cannot be disputed that appellants filed the Notice of
4 Construction application after design and bidding were complete and
5 after construction and installation began. They did not wait for an
6 approval before proceeding.

7 Estoppel, as an equitable principal, can only be raised by parties
8 with "clean hands," and appellants have not demonstrated such hygienic
9 attainment.

10 Additionally, estoppel does not apply if to do so would authorize
11 an unlawful act. See, J & B Development Co. v. King County, 29 Wn.App
12 942, 631 P.2d 1002 (1961). In this instance, BACT is required by law
13 and regardless of somewhat murky preliminary communication as to what
would constitute BACT in this case, appellants did not obtain a
15 definitive determination of the matter through the statutory procedure
16 prior to going forward with their project.

17 We conclude that applying estoppel against PSAPCA would frustrate
18 the purpose of the laws and thwart public policy. See, Finch v.
19 Matthews, 74 Wn.2d 161, 169-170, 443 P.2d 833 (1968). Allowing a new
20 source of pollution to add emissions over what is known, available and
21 feasible to attain, would impermissibly burden a public which has
22 little choice over the air it breathes. To do so would frustrate the
23 purpose of the Clean Air Act and Regulation I to achieve clean air.

1 X

2 Appellants' attempted to eliminate the BACT issue, claiming lack
3 of notice. We conclude that notice was adequate. BACT was raised by
4 PSAPCA by motion filed two days in advance of the first day of
5 hearing. However, the hearing was held on two separate days, thirteen
6 days apart, providing appellants with ample opportunity to respond; an
7 opportunity they took advantage of. Appellants have not demonstrated
8 prejudice or undue surprise.

9 City of Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985),
10 cited by appellants, is not persuasive authority for their motion to
11 strike BACT as an issue. As that case recites: "'[T]he most
12 important fact about pleadings in the administrative process is their
13 unimportance.'" Id., at 119. Pleadings in an administrative
14 proceeding serve a notice function. But proof may depart from
15 pleadings and the pleadings may be deemed amended if there is no undue
16 surprise or prejudice. Id. Here PSAPCA, in effect, asserted BACT as
17 an alternate basis for its denial of the Notice of Construction
18 application at a time and under circumstances which permitted the
19 issue to be litigated in these proceedings.

20 The Marysville case reversed a decision which was based upon
21 finding the violation of different standard from the one under which
22 the case was tried. Such is not the situation here.

23 XI

24 Any Finding of Fact which is deemed a Conclusion of law is hereby
25 adopted as such.

26
27 FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER
PCHB NO. 87-56

(17)

From these Conclusions, the Board enters this:

ORDER

THEREFORE, the Order to Prevent Construction is AFFIRMED

DONE this 24th day of August, 1987.

POLLUTION CONTROL HEARINGS BOARD

[See separate opinion]

JUDITH A. BENDOR, Presiding

Wick Dufford

WICK DUFFORD, Chairman

Lawrence V. Faulk 8/24/87

LAWRENCE V. FAULK, Member

2 Bendor - Concurring in Part and Dissenting in Part:

3 I agree that the Order to Prevent Construction should be affirmed
4 on the basis of the failure to demonstrate compliance with BACT. I
5 respectfully dissent only from that portion of the majority opinion
6 which holds that the December 1986 test demonstrated compliance with
7 the particulate emissions standards. (Conclusion of Law V).

8 I

9 The incinerator was tested at a 720 pound per hour loading rate,
10 despite its being characterized in the Notice of Construction, and
11 Appellants' Test Plan submitted to PSAPCA, as a 900 pound per hour
12 system.

13 II

14 Particulate emission concentrations from the three test runs were
15 calculated by American to be:

16 First Run: .034 grains/dry stand cubic foot of exhaust as
17 corrected to 12% carbon dioxide (CO₂) less the
18 CO₂ contribution from the auxiliary fuel.
19 [hereafter: "gr/dscf"]

20 Second Run: .039 gr/dscf

21 Third Run: .054 gr/dscf

22 III

23 During Run 1 the nozzle-size was changed.
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1 IV

2 Throughout the test American systematically failed to sample for
3 particulate emissions during the waste loading cycle. No evidence was
4 presented that burning or release of emissions ceased during loading
5 or that this failure to sample was a good engineering practice.

6 V

7 PSAPCA's Regulation I at Section 11.01 states (in part):

8 All definitions and sampling procedures shall conform to
9 current Environmental Protection Agency ["EPA"]
10 requirements where applicable and available, otherwise by
using procedures and definitions adopted by the Board after
public hearing.

11 In this case EPA's test sampling method applied, e.g. 40 CFR Pt. 60.
12 Method 5 of Pt. 60, Section 4.12 states in pertinent part:

13
14 Select a nozzle size [. . .] such that it is not
15 necessary to change the nozzle size in order to maintain
isokinetic sampling rates. During the run, do not change
the nozzle size.

16 VI

17
18 Applicable regulations at 40 CFR Pt. 60.8(f), further state (in
19 part) that:

20 (f) Unless otherwise specified in the applicable
21 subpart, each performance test shall consist of three
22 separate runs using the applicable test method. Each run
23 shall be conducted for the time and under the conditions
specified in the applicable standard. For the purpose of
determining compliance with an applicable standards, the
24 arithmetic means of results of the three runs shall
25 apply. In the event that a sample is accidentally lost

1 or conditions occur in which one of the three runs must
2 be discontinued because of forced shutdown, failure of an
3 irreplaceable portion of the sample train, extreme
4 meteorological conditions, or other circumstances, beyond
5 the owner or operator's control, compliance may, upon the
6 Administrator's approval, be determined using the
7 arithmetic mean of the results of the two other runs.
8 [emphasis added].

9 40 CFR Pt. 60.2 defines a "run" to be the:

10 [. . .] net period of time during which an emission
11 sample is collected. Unless otherwise specified, it may
12 be either intermittent or continuous within the limits of
13 good engineering practice.

14 VII

15 Changing the nozzle size during Run No. 1 invalidates that run.
16 Appellants have not demonstrated that their efforts to compensate for the
17 nozzle change constituted an "equivalent method", so as to satisfy
18 required criteria. See, 40 CFR Pt. 60.2.

19 Since only two runs thereby remain, they are insufficient to meet
20 the 50 CFR Pt. 60.8(f) "three separate run" requirement for a new
21 source test. Furthermore, there is no evidence that any of the
22 situations which would lawfully permit averaging the two remaining runs
23 (e.g. forced shutdown, loss of sample train, etc.) were present. Nor
24 was approval for averaging only two runs requested and received. To
25 the contrary, PSAPCA has objected to averaging two runs.

26 VIII

27 Appellants have failed to demonstrate that failing to sample during
waste loading was a good engineering practice. Therefore, on that
basis all three runs are invalid. See, 40 CFR Pt. 60.2.

IX

Emission tests are required to represent real operating conditions. Appellants failed to test at the 900 pound per hour loading rate, thereby failing to follow the proposed operating level in the Notice of Construction or their own Test Plan. The test therefore does not mirror proposed real operating conditions and is therefore invalid. Alternatively the test is at best only valid for a 720 pound level of operation, to the extent otherwise invalid.

X

For all the foregoing reasons, PSAPCA's denial of the Notice of Construction, as based on a determination that particulate emissions standards compliance had not been demonstrated, was correct.

In addition, the bypass stack was not sampled for emissions. The stack has no damper on it. Appellants did not prove that emissions could not be released through that stack, but rather that during the December 1986 no emissions were released. Therefore, if retesting is required, sampling that stack is merited.

Lastly, prior to such retesting, VA personnel should be trained to operate the incinerator so that the assistance of outside personnel is not required, so as to dispel related questions about approximating true operating conditions.


JUDITH A. BENDOR, Presiding